United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To be argued by
FREDERICK E. WEINBERG

76-1118

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

JEROME MACKEY and WILLIAM NELSON,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT JEROME MACKEY

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Questions Presented

1. Whether the evidence was sufficient to establish Mackey's guilt.

2. Whether the testimony of the hardships sustained by the purchasers of distributorships requires the direction of a new trial.

3. Whether the presentation to the indicting grand jury of testimony which violated the privileged character of Mackey's disclosures to his attorney requires the dismissal of the indictment.

Statement Pursuant to Rule 28 (a) (3)

Preliminary Statement

This is an appeal from a judgment of conviction after a jury trial in the United States District Court for the Eastern District of New York (The Honorable Jack B. Weinstein). The crime charged in the indictment was that Mackey, together with Taylor and Nelson, had devised a scheme to defraud the distributors of stereo tapes and equipment by selling distributorships to them upon the basis of fraudulent misrepresentations involving the use of the United States mail in violation of Title 18, United States Code, Sections 1341 and 2. Defendant Mackey did not testify. He was found guilty under 6 counts of a 21 count indictment. Sentence on February 20th, 1976 was to 5 years' imprisonment on each count, to run concurrently, to serve 6 months and the remainder of the sentence suspended.

Statement of Facts*

Taylor

In 1972 Taylor had been the Vice-President and responsible for the operations of MDI (227). One week before the trial he had pleaded guilty to a violation of Title 18, Section 371, charging him with conspiracy to commit mail fraud violations. At the time of the trial he had not yet been sentenced (id.).

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* Parts of the testimony, which relate only to the alleged damage of customers, are omitted from this statement, but are set forth under Point II, *infra*. Throughout this brief, Mackey Distributors, Inc. will be referred to as MDI and Jerome Mackey's Judo, Incorporated will be referred to as Judo.

The Agreement Between Taylor, Nelson and Mackey

Taylor and Nelson had been associated together in Oklahoma City for a number of years prior to 1972. In March or April of that year Nelson told Taylor that he had a nephew in New York City, the defendant Jerome Mackey, who had recently obtained funds from the sale to the public of stock in a corporation known as Jerome Mackey Judo, Inc. and who might be interested in making money (232-34). Shortly thereafter, Taylor and Nelson left Oklahoma for New York City. Then, either during the last week of March or the first week of April, they joined Mackey in a number of conferences which were held in the office of Judo in New York City (232-35).

At those conferences an agreement was entered into to sell distributorships (franchises) for the right to sell stereo tapes, equipment and locations to the general public (232-35). Taylor testified that Mackey knew nothing at all about the tape business: all that Mackey knew was what Taylor told him (368).

It was agreed that Taylor and the defendants Nelson and Mackey were to sell franchises for the sale of stereo tapes and equipment and to divide the profits from those franchise sales equally between the three men (235-41). The franchise sales were to be made in the name of MDI, which was to be set up as a wholly owned subsidiary of Judo (245).

The functions of the three men were to be as follows: Taylor was to be in charge (241), Nelson was to be salesman (id.) and Mackey, as the only one of the three who had a name for reliability (468), was to lend his name and to put up all the money (241; 365-66).

Taylor testified that the conferences included some discussion about the legal status of the operation, but that they agreed that any problems of that kind could be handled through the office of the New York State Attorney General (239). The only reference which was made to selling techniques was Taylor's statement that his experience had made him wary of the problems which might result from any misrepresentations: so that he told the other two that the salesmen should tell their customers "just what they were getting into" (237).

On April 21, 1972, a checking account was opened up in the name of MDI at a branch of the Franklin National Bank (904). Mackey, as the President of the corporation, was at first the only corporate representative who was authorized to sign corporate checks (904-05). On August 13th, however, the exclusive power to sign corporate checks was transferred from Mackey to Taylor and Nelson (294; 596-97; 765).

At this point we temporarily abandon our effort to maintain chronological purity; since there is no chronologically correct place at which to state the following facts. Throughout the entire period of the MDI sales of the distributorships, Mackey was not on the payroll and received no salary or dividends (470; 395; 290). Through the same period Taylor and Nelson each drew a regular salary of $400.00 a week (757, Ex. 41-B).

From April Through December 1st, 1972

Mackey did no selling (371). So far as Taylor knew, Mackey never gave any instructions to the salesmen (394). There was just one instance in which Mackey gave Taylor his own view about a particular sales technique. Taylor testified that sometime in April he had mentioned to Mackey a plan to sell a tape route to a purchaser who would be advised to keep a record in order to verify the sales of tape on that route and then make that record available to other customers. Such a man was called a "singer." Mackey had agreed that it might be a good idea, but nothing came of it (307-08).

Sometime in July Taylor informed Mackey that the sales of distributorships had fallen to such an extent that, unless Mackey himself were prepared to put up more money, the operation would have to be terminated (270-01). Mackey's answer was that, if the business couldn't make it on its own, there was no point in his putting in any more money (374). Taylor then recommended the employment of a former associate of his, a man named Fisher, who would, in Taylor's opinion be able to sell a lot of distributorships. At the same time, however, Taylor warned Mackey that, while Fisher was a good salesman, he "would probably create a lot of problems for us through misrepresentations" (271). Taylor then assured Mackey that he thought he could control Fisher (278). Mackey's answer was: "If you think you can control Fisher, let's go ahead and see if we can work our way up to sales" (275). Accordingly, Fisher was employed and he brought with him three other salesmen who had worked with him in the past (369).

The hiring of Fisher produced some brief discussions as to selling methods. Taylor told Mackey that Fisher had suggested the use of a device, which had previously been discussed but abandoned, of selling distributorships to control persons who would then be able to supply records to other MDI customers in order to substantiate the value of particular routes. Taylor testified that Mackey had "just kind of laughed" at the revival of that suggestion (307).

Another of Fisher's suggestions was to have the salesmen represent that they were selling major label tapes, but deliver only duplicated tapes. A major label tape is a recording of first quality which, after it had lost its popularity, is then distinguished by a hole punched in the end of it. It is then known as a "cut-out," due to the fact that it had been cut out of the company's catalogue (274). A duplicated tape is a tape which, although sold under a different label, gives the same sound as the major label tape with somewhat less quality. In informing Mackey of Fisher's suggestion to deliver duplicated tapes instead of major label tapes which would include "cut-outs," Taylor told Mackey that he thought he could convince the purchasers to accept "at least part of the shipment in duplicated tapes because actually they were more saleable than the 'cut-outs' were" (275-76). Upon that basis Mackey agreed to the plan of delivering duplicated tapes, but only with the understanding that, if any customer were not convinced that the duplicated tapes were as satisfactory as the major label "cut-outs," he would have to be given the "cut-outs" (279-80).

Fisher's advent marked an upturn in the sales picture. In August Mackey told Taylor that he thought Fisher must be a good salesman (319; 320). By September, how-

ever, it was becoming evident that the purchasers of the distributorships were expressing their dissatisfaction in increasing numbers. Complaints kept coming in about the tapes, cabinets or locations (320-23). When Taylor told Mackey that he was having difficulties with the customers, Mackey "kind of laughed" and said that he was glad that the job of satisfying the customers was Taylor's rather than his own (324).

No customer's complaint was brought directly to Mackey's attention until December and January when, as will appear, both Taylor and Fisher had departed. Mackey was, however, continuingly aware of the development of customer dissatisfaction and sought to deal with it in the only manner that was then available. He was constantly seeking to raise money in order to remedy the condition presented by the contracts that weren't being fulfilled (1317).

At this point we may examine the paradoxical situation exhibited by a sales operation which (according to Taylor) had grossed at least $200,000.00 and possibly $250,000.00 from the commencement of its activity in April until December 1st (347), and yet was apparently unable to find the money to satisfy the complaints of its disappointed customers—complaints that could have been completely satisfied by the replacement of superior tapes or locations or by the return of a customer's money.

In September or October of 1972 Taylor had caused to be formed the MTM Corporation; its purpose, "basically," was to deal with MDI (416; 417; 424). Taylor "believed" that he was the MTM President (424). He invested no cash in MTM, but put in some stereo tapes which he testified to having bought on credit from certain of his friends

(416). A little later he purchased stereo tapes from MTM and delivered them directly to customers of MDI (421; 429). All these transactions were conducted while Taylor was simultaneously President of MTM and Vice-President of MDI (421). They involved the transfer of substantial sums of money from MDI to MTM, but Taylor was unable to estimate the amount thus transferred (421). He testified that he had kept no records (id.).

Concurrently with the foregoing transactions Taylor had formed the B&G Sales (unincorporated) of which he was the sole owner (431). When asked to state its location, Taylor's answer was that it "wasn't located at all" (id.). B&G, through a man named McCoy, sold tapes to Taylor individually which he later resold (432). Under date of September 22nd, 1972 Taylor, ostensibly representing MDI, advised all the MDI distributors that their orders would thenceforth be filled by B&G instead of by MDI, and that the checks of all MDI distributors should be made payable to B&G (Defendant's Ex. G). B&G maintained no books or records and Taylor had no idea how much money he had made through his transactions with that concern (435). In answer to the question whether it was just about that time that MDI "all of a sudden had no money in the bank," Taylor first stammered and then testified that "there were a lot of periods when Mackey Distributors had no money in the bank" (436).

On Thanksgiving Day Taylor and Fisher tried to get Mackey to put more money into the firm (607). The money was not requested for the purpose of meeting the needs of customers, but ostensibly for the purchase of a tape vending machine (607 *et seq.*). Mackey refused. Fisher then quit the firm and left town on the following day, and Taylor resigned and left town on December 1st (610; 344).

After December 1st, 1962

Immediately following the departures of Taylor and Fisher, Mackey directed the secretary of MDI to prepare an audit of the books and to have it completed as soon as possible (753; 784-85; 811-12). That audit disclosed that over $50,000.00 was missing (789).

On December 6th Mackey and Nelson filed a complaint against Taylor with the Nassau County District Attorney (1264). Shortly thereafter MDI was adjudicated bankrupt (1562).

POINT I

There was no evidence that Mackey had acquiesced in any improper sales.

The crime charged in the indictment was of having devised a fraudulent scheme. It was not of having acquiesced in particular fraudulent sales. The testimony in relation to a scheme will be examined under Point III, *infra*. The purpose of the statement under the present Point is simply to draw the material portions of the statement of facts into sharper focus. It will show that, apart from any question of a scheme, Mackey was not even aware that any sales might have been fraudulent.

In every instance in which any questionable sales technique was brought to Mackey's attention, he took a stand in opposition to its use. Thus, when Taylor, although pressing for the employment of Fisher as a salesman, told Mackey that he feared that Fisher's sales methods might involve MDI in claims of misrepresentation, Mackey

consented to the hiring of Fisher only upon Taylor's express assurance that he would be able to control Fisher (271; 278). And when, thereafter, Fisher suggested that duplicated tapes be delivered in place of the major label "cut-outs" which had been shown to the customer, Mackey gave his consent only upon Taylor's statement that the duplicated tapes were even more saleable than the "cut-outs" (275)—and then only upon the condition that the duplicated tapes would be acceptable to the purchaser (279-80).

When the financial irregularities of Taylor and Fisher were finally disclosed by the audit which was made directly after their departure, Mackey brought the MDI situation to the attention of the Nassau County District Attorney. He did so promptly, within the week succeeding Taylor's departure (1264). The United States Attorney commented in his summation that that might have been simply a "snow job." Clearly, however, the danger which a guilty Mackey would have been courting by that prompt complaint to the County District Attorney must far have outweighed any benefit which he could reasonably have expected from the affectation of a virtuous posture.

POINT II

The guilty verdict was due to or influenced by testimony of the severe hardships sustained by certain purchasers of distributorships.

The Testimony of Customer Hardships

The prosecution introduced testimony that five of the MDI customers had been unemployed at the times at which they had mailed their checks to MDI (Flynn, 165, 167; Connors, 223; Suk, 893; Read, 1097-98; Mellody, 1221). The payments made by those five unemployed customers totalled $26,562.50 (162; 199; 893; 1101 *et seq.*; 1222).

Additional testimony from the purchasers of distributorships was as follows: Flynn testified that at the time that he mailed his check he was worried about his ability to support his wife and five children and had nothing to look forward to until the union could find him another job (165). Connors testified that he had just been discharged from the Navy and that his unemployment checks had "run out"—also, that the check which he had given to the representative of MDI constituted his total savings from the Navy together with what his wife, who had been working since she was 17 years of age, had given him (223). Cole testified that his check represented money which he couldn't afford to lose (504-05).

The above testimony did not represent instances in which severe customer hardship came before the jury as an unavoidable fringe to testimony which was relevant. The United States Attorney devoted part of his summation to a peroration about the testimony that, at the very time that Flynn had mailed his check to MDI for $4,275.00, he

had five small children and three days later was to be out of a job (1555). In another part of his summation he referred to the fact that Mr. and Mrs. Connors, in their payment for a distributorship, had "put up their hard-earned money that they had made from the United States Navy" (1544). And he kept Mellody, a purchaser who had complained about having lost money from his purchase of a distributorship, sitting in the courtroom in the full presence of the jury throughout the summations and despite the objection of Mackey's counsel (1424-25).

In *U.S.* v. *Brown*, 79 Fed. (2d) 321, 324 (1935), Judge Learned Hand, writing for this court, stated, *obiter*, that, in a trial under a mail fraud statute, unnecessary emphasis upon customer hardship would require the reversal of a conviction unless the proof of guilt were shown to have been, as that Judge put it, "irrefragible."

The Government may argue that, even if its unnecessary emphasis upon customer hardship could have been prejudicial, it was not prejudicial error: since counsel for the defendants did not object. It must be noted, however, that the harm which such testimony might have produced was incalculable. The testimony was clearly introduced in an attempt to generate the age-old reflex to redress misfortune by vengeance. The tradition which has been developed in favor of disregarding prejudicial testimony which has not been objected to at the trial lacks the pertinancy today that it had 400 years ago. In the days when appeals had been criminal proceedings to charge the trial court and jury with perjury, the rule that the reversibility of a judgment for error depended upon an appropriate protest having been made at the trial was essential to protect trial court and jury from punishment for improper conduct

of which they might not have been aware. Such a consideration is no longer relevant.

This court can protect Mackey from the consequences of the foregoing irrelevant and highly prejudicial testimony without doing any injustice to the trial court or jury. The deliberate emphasis which was given to that testimony requi[illegible] the application of the principle announced by Judge Hand.

The Significance of the Jury's Expressed Concern With Whether Mackey Was, Through Judo, the Owner of the Enterprise

During the course of their deliberations the jurors sent the following note to the trial court: "Could we have a legal definition of a wholly owned subsidiary?" (1645). The court then instructed the jury that a "wholly owned subsidiary" should be understood in the context of what ordinary lay people would consider, as distinct from the content of any tax statute (1657). However, acting in response to the unanimous request of the jurors for the dictionary definition and to one juror's request for the definition contained in the Tax Law, the court gave both the definition contained in Webster's Third International Dictionary and the definition contained in Section 1504 of Title 26 of the United States Code (1656-58).

The significance of the foregoing does not lie in the nature of the court's instructions. It lies in the fact that the jurors had made the request, together with the zeal which they then displayed in their pursuit of the answer. On the evidence presented, the salesmen's representations that MDI was a wholly owned subsidiary of Judo could not have been found fraudulent. The only testimony with

respect to that relationship had been the testimony of Taylor that, at the time that the agreement had been entered into between Taylor, Nelson and Mackey, it had been intended that MDI would be set up as a wholly owned subsidiary of Judo (245). That testimony was uncontradicted. The Government submitted no evidence at all as to just how MDI was set up.*

On the proof, therefore, the jurors could have had only one probable purpose in seeking to learn the definition of a wholly owned subsidiary. That purpose must have been to satisfy themselves that Mackey, through his ownership of Judo (233), was the real owner of Judo's wholly owned subsidiary, MDI. The court's definitions of a wholly owned subsidiary confirmed the fact that he was. Thereupon, the jury, borrowing from the civil liability doctrine under which the master is held responsible for the misconduct of his agents, simply applied the same doctrine to the end of fixing Mackey's criminal liability.

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* If the United States Attorney should argue that the status of MDI as a wholly owned subsidiary of Judo had been impaired or in some way affected by the profit sharing arrangement between Taylor, Nelson and Mackey, it need only be observed that Taylor's testimony established that the three men themselves had believed their arrangement to be perfectly consistent with MDI's status as Judo's wholly owned subsidiary (245). So that, whether their beliefs as to that aspect had been correct or incorrect, the representation which adopted their beliefs could not have been fraudulent.

POINT III

There was no evidence that Mackey had devised, knowingly participated in or knowingly aided in the execution of a scheme to defraud.

The crime charged in the indictment was that, during the period from about April 1st, 1972 and thereafter until at least March 1st, 1973 Mackey, Taylor and Nelson devised a scheme to defraud prospective stereo tape distributors by starting a distributorship business under the name of Mackey Distributors, Inc. and selling distributorships by means of certain fraudulent misrepresentations; that part of that scheme included the use of the United States mails; and that, for the purpose of executing that scheme, Mackey, Taylor and Nelson received checks from certain named distributors-mailors which had been delivered by the United States Postal Service to Mackey Distributors, Inc.

The motions of defendant Mackey to dismiss at the end of the prosecution's case and to set aside the verdict were denied (1249-53; Docket, p. 4).

As a Matter of Law, Proof of the Devising of a Fraudulent Scheme Was Essential to a Conviction

In (1932) *Pelz* v. *United States* (C.A., 2d Cir.), 54 F. (2d) 1001, this court reversed a judgment of conviction under an indictment which had charged the defendants-appellants with having conspired to defraud through the use of the United States mails. The stated *ratio decidendi* was the failure of the trial court to give the jury appropriate instructions as to a basic criterion of guilt. The court stated that the trial court should have charged the jury in the following or equivalent language (p. 1005):

> "The evidence should have convinced that the appellants did something other than participate in the offense which is the object of the conspiracy. There must be proof of an unlawful agreement and participation therein with knowledge of the agreement."

In (1907) *Faulkner* v. *United States* (C.A., 5th Cir.), 157 F. 840, 841, the court reversed a judgment of conviction under an indictment which had been brought under a similar mail fraud statute. Portions of the court's opinion seemed to indicate that the alleged fraudulent misrepresentation in that case might have been only a slight exaggeration. However, another part of the opinion fixed the cause of the reversal as having been the failure of the evidence to establish the existence of a fraudulent scheme. The court stated that, if that defendant had been guilty of fraudulent conduct in the absence of a scheme, he could be prosecuted therefor under the laws of the State—impliedly, but not under the Federal mail fraud statute.

The foregoing decisions applied a fundamental principle to particular facts. A judgment of conviction, to be sustained, must establish the defendant to have been guilty of the crime charged in the indictment. In the foregoing cases, as here, that crime was the devising of a fraudulent scheme, as distinct from simply having committed acts which might have been consonant with such a scheme if devised.

The Evidence Did Not Establish That Mackey Had Devised or Participated in a Fraudulent Scheme

The agreement between Taylor, Nelson and Mackey which the indictment charged was testified to by Taylor (237 *et seq.*). On the evidence, that was the only agreement that was made. It included no statement nor even a sug-

gestion as to any fraudulent objective. To the contrary: Taylor testified that he had then stated to Mackey and Nelson that the salesmen should be instructed to tell the purchasers of the distributorships just what they were getting into (237).

Since it is sometimes possible to establish the existence of a fraudulent plan by proof of a fraudulent practice which was both so uniform and so well known to all the participants as to raise the inference of its having emanated from a plan, we shall examine the evidence with that in mind.

The evidence showed, at most, that certain purchasers of distributorships had complained at not having received the proper tapes, equipment or locations. It did not appear that the number of those complaints had represented a substantial proportion of the total distributorships which had been sold, or to what extent any allegedly faulty performance could have been attributed to fraud as distinct from breach of contract or misrepresentation falling short of fraud, or whether, even if in some instances amounting to fraud, that fraud could have been imputable to management as distinct from the salesmen.

But even if the evidence had warranted a finding of fraudulent sales and the imputation of that fraud to the management, there was, literally, no testimony that implicated Mackey. We bypass now the absence of affirmative testimony which might have charged Mackey with contemporary knowledge of a practice of faulty performance or, even, of fraudulent sales. The evidence was directly to the contrary. If such a practice had existed, there was affirmative testimony that Mackey did not know of it. His

consistent opposition to the questionable sales tactics which Taylor suggested showed that Taylor himself was aware that Mackey would not have stood for any misrepresentations (275). The conversations between Mackey and Taylor about the need to exercise control over Fisher's propensity for misrepresentation were particularly significant. If Mackey and Taylor had themselves been engaged in a fraudulent scheme, it is impossible to imagine such conversations to have taken place without some reference, however indirect, to their own fraudulent purposes (271, 275). Finally, Mackey's continuing willingness to permit Taylor and Nelson to each draw $400.00 a week, while he himself, although having put up all the money (365-66), drew nothing, was simply a cumulative indication that he had not been engaged with the others in a scheme to defraud (470; 395; 290; 757; Ex. 41-B).

The Nature of the Verdict, Considered as a Whole, Establishes That the Jury Did Not Find Mackey to Have Devised or Participated in a Scheme to Defraud

The jury found Mackey guilty under the counts numbered 9, 10, 11, 12, 14 and 15, but not guilty under any other count (1661-63).* Specifically, it found him not guilty

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* The word "count" as used in the indictment appears to be ambiguous. It was used both to designate the separate specifications which identified the misrepresentations contained in the alleged fraudulent plan (Indictment, pp. 1-4) and to identify the dates of the alleged mailings of ads to the newspapers (Indictment, pp. 4-5). There is, however, a clear clue as to what the word "count" was supposed to mean and did, in fact, mean to the jury. Both the court's charge and the verdict referred to count 15 (p. 7 of the charge, 1599; 1664). The only count 15 that existed was the one which referred to the mailing date of an ad to a newspaper (Indictment, p. 5). Unless, therefore, the word "count" was a reference to the date of the mailing of an ad, the guilty verdict under count 15 would have referred to a count which was, literally, non-existent.

under any mailing count which had occurred before October 8th, but found him guilty under those mailing counts (except number 13) which referred to mailings in the period from October 8th through November 11th (Indictment, pp. 4-5).

Now the agreement between Taylor, Nelson and Mackey was testified to by Taylor as having been made in April of 1972 (238-42). There was no testimony that there had been another agreement. What, therefore, could have been the significance in the jury's eyes of October 8th? If the jury had actually found Mackey to have devised a fraudulent scheme, why did it select October 8th as the date of the commencement of his criminal conduct thereunder? There was no testimony that it was in or about October 8th that Mackey first performed some signficant act or first learned of something which could have given him reason to suspect something of which he had previously been unaware. Why then October 8th?*

The answer to the riddle of October 8th may perhaps be found in a consideration of the dates of five particular sales of distributorships. The sales to Connors, Mellody, Anderson, Suk and Flynn were alleged to have taken place between September 28th and November 11th (199; 1222; 895;

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* We may anticipate a suggestion that the jury's selection of October 8th as his earliest mailing might have been related to a finding that the ads referred to in the guilty counts might have been the first ads that any MDI customers had seen. The contrary, however, was the case. On the evidence, none of the ads referred to in those counts was ever seen at all. There was no testimony that the ads alleged in counts 10, 11, 12, 14 and 15 were ever seen by a prospective customer. While one customer did claim that he had seen the ad referred to in count 9, his testimony was that he had seen that ad on September 22nd (156), whereas count 9 alleged that ad to have been inserted in a newspaper on October 8th.

1091; 162). As has been shown, those were the distributorship purchasers which the United States Attorney had selected for the purpose of bringing out the severe hardships which had been suffered by particular MDI customers.

It may be impossible to establish a hard and fast connection between the dates of the period covered by the counts under which Mackey was found guilty and the dates of any particular distributorship sales. One thing, however, stands out clearly from the verdict considered as a whole. If Mackey had been found guilty of having participated in the devising of a fraudulent scheme—as distinct, that is, from having gone along with particular sales—the jury would have found that guilt to have existed in April (or shortly thereafter) when such a scheme, if any, must have been conceived or brought to his attention. In that event, the date of his first attempt to implement the scheme would not have been set at six months after the business of selling distributorships had been in continuous operation and all the alleged improprieties completed. If the jury had found that a fraudulent scheme had been devised in or about April (the approximate date at which it must have been devised, if at all), it would certainly have found him to have been participating in its implementation before October 8th.

Clearly, therefore, the jurors, misled by the testimony which had said nothing at all about a scheme to defraud, but had had so much to say about particular sales, overlooked the identity of the crime charged. Their sympathy for the losses which had been sustained by certain "high hardship" customers had pre-empted the focus of their attention. From sympathy came resentment. Then, when they learned from the formal definitions of a wholly owned

subsidiary that Mackey had been the owner of the enterprise, they expressed that resentment through a verdict of guilt which tied him to the others. They permitted the immoralities of the MDI prime mover to envelop the owner of the enterprise, notwithstanding that that prime mover had, by siphoning off MDI profits into MTM and B&G Sales, driven MDI into bankruptcy and thereby destroyed the owner of the enterprise as well as the corporation itself. Yet the form of the verdict is significant. Through its exoneration of Mackey for the period which had preceded October 8th, it made it clear that Mackey had not been found guilty of devising a fraudulent scheme.

POINT IV

The prosecution's information concerning the joint venture between Taylor, Nelson and Mackey had been derived from testimony before the grand jury given by Mackey's former attorney in contravention of the privilege between attorney and client.

Thomas Mazza, Mackey's former attorney, gave the following testimony before the grand jury (Defendant's Ex. A)

In April of 1972, Mr. Mazza had been employed by Mackey as his attorney to form MDI (id., pp. 2-3; 7-8). Later, in the fall of 1972, either Mackey or one Ian Sutherland, who was acting on Mackey's behalf, furnished Mr. Mazza with information to be put into an agreement under which Judo was to sell all its stock to Taylor and Nelson (id., pp. 6; 9; 5-6).

Mackey did not waive his privilege with respect to the foregoing information (1331 *et seq.*).

The kernel of the indictment and the impetus to this prosecution had been derived from the United States Attorney's knowledge of the existence of a joint venture between Taylor, Nelson and Mackey. It was not shown that, the testimony of Mr. Mazza apart, the prosecution would have ascertained the existence of that relationship from any other source. It might have, but it might not have.

A client has the privilege of preventing his attorney from disclosing confidential information which had been imparted to him by the client during the attorney and client relation and in order to facilitate the rendition of the attorney's services. Supreme Court Rule 503 (b). Where privileged information had been placed before the indicting grand jury, then, in the absence of a waiver by the defendant, the prosecution has the burden of showing that it had not used that information or any information even indirectly derived therefrom. Otherwise the indictment may be dismissed. (1973) *Goldberg* v. *U.S.* (C.A., 2d Cir.), 472 F. (2d) 513, 516; (1953) *U.S.* v. *Lawn* (D.C. S D. of N.Y.), 115 F. Supp. 674.

Mackey's motion to dismiss the indictment upon the foregoing ground was erroneously denied (1331, 1345).

CONCLUSION

For the foregoing reasons, the judgment of conviction should be reversed and the indictment dismissed. In the alternative, the matter should be remanded and a new trial directed.

Respectfully submitted,

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